Bethenergy Mines, Inc. *and* Mark Segedi. Case 6–CA–21560

September 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

Upon a charge filed by Mark Segedi, an individual, on January 27, 1989, and an amended charge filed on August 29, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on September 11, alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by conditioning the reinstatement of employees Mark Segedi, Fred Eimer, Patsy Bava, Joseph Goblesky, and Jared Dobrinski on their written agreement not to hold office in United Mine Workers of America, Local 1197 (the Union) until the expiration of the current contract on January 31, 1993.

On November 14, 1991, the General Counsel, the Charging Party, and the Respondent filed with the Board a stipulation of facts and motion to transfer the case to the Board. The parties stated that the original charge, amended charge, complaint, stipulation of facts, and attached exhibits constitute the entire record in this case and that they waive a hearing before an administrative law judge. On February 11, 1992, the Board approved the stipulation and transferred the proceeding to itself for issuance of a decision and order.

On March 3, 1992, the General Counsel and the Respondent filed briefs with the Board.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation with an office and facility in Eighty-Four, Washington County, Pennsylvania, is engaged in the mining and sale of bituminous coal. During the 12-month period ending June 30, 1989, the Respondent shipped from its Eighty-Four, Pennsylvania facility goods and materials valued in excess of $50,000 directly to customers outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Mark Segedi, Fred Eimer, Patsy Bava, Joseph Goblesky, and Jared Dobrinski were employed by the Respondent on July 5 and 6, 1988,[1] and prior to that time. The Union is the collective-bargaining representative of a unit of approximately 400 employees. On the dates specified, Bava was president of the Union, Eimer was the Union's safety committee chairman, and Segedi was a safety committee member for the Union. Goblesky and Dobrinski held no union office.

On July 5, the Respondent's employees represented by the Union, including Segedi, Eimer, Bava, Goblesky, and Dobrinski, commenced an unauthorized work stoppage at the Respondent's Eighty-Four worksite because of a dispute concerning health care benefits. On July 6, Segedi, Eimer, Bava, Goblesky, and Dobrinski picketed the U.S. Steel Mining Company's Maple Creek facilities in furtherance of the work stoppage. The work stoppage continued through July 7. The contract between the Respondent and the Union provides mandatory administrative procedures for the resolution of disputes about health care benefits. The work stoppage at the Respondent's Eighty-Four worksite did not involve an existing dispute at the U.S. Steel facilities.

On July 15, the Respondent suspended with intent to discharge Segedi, Eimer, Bava, Goblesky, and Dobrinski. The Respondent cited the five named employees' participation in the unauthorized work stoppage at the Respondent's facility and the picketing at the U.S. Steel facility. The Respondent admonished: ''Unauthorized work stoppages are a terribly serious business. People who instigate a work stoppage, actively support it and spread it to other coal producers by picketing must expect to suffer the consequences of their acts.''

On July 18 and 19, Segedi, Eimer, Bava, Goblesky, and Dobrinski filed grievances concerning their suspensions with intent to discharge. The Union asked the Respondent to reduce the discharges to a lesser penalty. In response to the Union's request, the Respondent commenced settlement discussions with the Union[2] in an effort to resolve the dispute over the suspensions with intent to discharge, without resort to arbitration. The Respondent proposed that it would require, as a condition of reinstatement in lieu of discharge for the five employees, that each agree in writing not to hold

[1] All dates are in 1988 unless otherwise specified.

[2] The Respondent was represented by Tom Robertson, manager-human resources, and Tom Ehrke, senior supervisor-labor relations. The Union was represented by Paul Lemon, secretary-treasurer, of the Union's District 5, and August Martos, executive board member, of the Union's District 5.

union office for the balance of the collective-bargaining agreement. The Union stated that it had no objections to this condition or the three other conditions proposed by the Respondent,[3] but it was compelled to review them with the affected employees. The Union discussed the Respondent's conditions with Segedi, Eimer, Bava, Goblesky, and Dobrinski, and each stated that he was willing to sign a document incorporating the Respondent's conditions.

The Union informed the Respondent that Segedi, Eimer, Bava, Goblesky, and Dobrinski would comply with the stated conditions. On July 29, the five named employees signed the ''Last Chance Agreements,'' together with representatives from the Union and the Respondent.[4]

On August 29, Segedi, Eimer, Goblesky, and Dobrinski returned to work.[5] Segedi had previously been elected to the Coal Miners Political Action Committee (COMPAC). Unlike Segedi's prior safety committee membership, the COMPAC position involved no direct dealing with the Respondent as a representative for the Union. Segedi sought clarification as to whether the Respondent viewed his position with COMPAC as foreclosed by the ''Last Chance Agreement.'' The Respondent advised Segedi that continuing to hold his position with COMPAC was permissible, and the Respondent allowed him to continue in that position notwithstanding the language of the ''Last Chance Agreement.''

In May 1990, Segedi ran for the position of financial secretary of the Union, another position which involved no direct dealing with the Respondent as a representative of the Union. On May 21, the Respondent suspended Segedi with intent to discharge. The Respondent claimed that Segedi had violated the terms of the ''Last Chance Agreement.'' Segedi grieved the Respondent's conduct.

On June 11, Arbitrator Thomas M. Phelan issued a decision and award sustaining Segedi's grievance. The arbitrator noted that the ''Last Chance Agreements'' had been interpreted as precluding the signers from holding only those positions involving direct dealing with the Respondent. The arbitrator found this limitation consistent with the collective-bargaining agreement and the National Labor Relations Act. He stated:

> The members of the Union have the statutory right to be represented by someone of their own choosing, and that right would be diluted here for no good and valid reason. Who the Union has as *its* representative to deal with the *internal* affairs of the Union is not a legitimate concern of Management in the employment relationship, and when Management bases employment decisions on an Employee's participation as an officer of the Union dealing only with the internal affairs of the Union, it is discriminatory treatment based upon the Employee's intra-Union activity.

The Respondent complied with the arbitrator's decision and applied the ''Last Chance Agreements'' only to those union positions which involve dealing directly with the Respondent as a representative of the Union.[6]

B. *The Parties' Contentions*

At issue is whether the Respondent violated Section 8(a)(3) and (1) of the Act by conditioning the reinstatement of the five employees on their resignation from union positions that involved dealing directly with management, and their agreement not to hold such positions for the duration of the current contract.

The General Counsel argues that because the right to hold union office is clearly protected by Section 7,

[3] The Respondent required that the five named employees also accept a suspension with loss of pay and holidays but not seniority from July 15 until August 29, 1988; agree not to engage in or encourage unauthorized work stoppages or illegal picket activity at the Respondent's facilities or any other coal operator; and agree to immediate discharge in accordance with the provisions of the contract in the event of any violation of the stated terms.

[4] The complete agreement is as follows:

LAST CHANCE AGREEMENT

I _____ recognize that my personal actions and involvement in the picket activities and dealings with the members of UMWA Local Union No. 1197 before and during the course of the unauthorized work stoppage were completely inconsistent with my obligations as a UMWA member and/or representative and employee of BethEnergy Mines Inc.

I realize that my actions jeopardized the economic well being of both BethEnergy Mines Inc. and the members of Local Union No. 1197.

Based upon this recognition I voluntarily agree to the following terms as a fair and just settlement to my grievance in lieu of discharge.

1. I agree to accept a suspension with loss of pay and holidays, but with no loss of seniority or any benefits from July 15, 1988 until August 29, 1988.

2. I agree that I will not hold or seek to hold any union office or act as a representative for the term of the NBCWA of 1988, as defined by the UMWA International Constitution, or any subsequent UMWA Constitution.

3. I agree that I will not at any time during the course of my employment with BethEnergy Mines Inc. engage in or encourage an unauthorized work stoppage or illegal picket activity at a mine or related facility of BethEnergy Mines Inc., or any other coal operator.

4. I agree that if I violate any provision of this Last Chance Agreement that I shall be discharged immediately, in accordance with the provisions of the NBCWA.

Therefore, I voluntarily enter into this settlement under the terms described above.

_____ Date _____
Grievant

_____ Date _____
UMW Representative

_____ Date _____
BethEnergy Mines Inc. Representative

[5] Bava did not return to work and retired on September 1.

[6] These union offices include president, vice president, mine committeeman, and safety committee member.

an employer may restrict this right only by offering compelling evidence of legitimate business considerations. That evidence is said to be lacking here because there is no clear nexus between holding union office and the employees' participation in the unauthorized work stoppage and picketing.

The General Counsel also contends that the signing of the ''Last Chance Agreements'' by a representative of the Union and by the employees was not a waiver of statutory rights by either the Union or the employees. The General Counsel maintains that an agreement to sign the ''Last Chance Agreements'' is not a direct expression of such a waiver. Finally, the General Counsel asserts that the Board should defer neither to the ''Last Chance Agreements'' as a prearbitral settlement of the employees' July 15, 1988 suspension with intent to discharge, nor to the June 11, 1990 arbitrator's award. According to the General Counsel, there is no factual parallel between the contractual issue and the unfair labor practice issue; the arbitrator made only passing reference to the National Labor Relations Act; and the annulment of a Section 7 right is repugnant to the purposes and policies of the Act.

The Respondent contends that both the Union and the five employees waived the right to hold union office and that the ''Last Chance Agreements'' as interpreted by the June 11, 1990 arbitrator's award meet the Board's standards for deferral. The Respondent argues that the right at issue may be waived; that neither the Union nor the employees objected to this condition in the ''Last Chance Agreements''; and that the express language in the ''Last Chance Agreements'' constitutes a clear and unmistakable waiver. The Respondent asserts further that the ''Last Chance Agreements'' as interpreted by the arbitrator warrant deferral as a settlement arising from the parties' contractual grievance-arbitration procedures. Such deferral, it contends, furthers the national labor policy favoring private resolution of labor disputes.

C. *Discussion*

It is axiomatic that the right to assist a union by holding union office is protected by Section 7 of the Act and that employees and their unions may choose their own representatives. An employer therefore violates Section 8(a)(3) and (1) of the Act by refusing to employ an individual because he has been designated as union steward, or by conditioning an employee's reinstatement on resignation from the union and an agreement not to run for union office for a set period of time.[7] Standing alone, the ''Last Chance Agreements'' would appear to violate these principles. Nevertheless, the particular facts of this case do not warrant finding a violation of Section 8(a)(3) and (1) of the Act. We find that it is appropriate to defer to the ''Last Chance Agreements,'' as interpreted by the June 11, 1990 arbitration award, as a settlement of the grievances arising from the July 15, 1988 suspensions, with intent to discharge, of the five employees. We defer because we find that the restriction on the five employees' participation in union affairs was substantially justified by the unprotected conduct of the five employees. We also rely on the fact that the employees themselves waived their Section 7 rights.

In deferring to the ''Last Chance Agreement,'' as interpreted by the June 11, 1990 arbitration award, we are guided here by our established policy favoring private resolutions of labor disputes.[8] We have long applied a four-part standard for deferral; that: (1) the proceedings were fair and regular; (2) all parties agreed to be bound; (3) the unfair labor practice issue was presented to and considered by the arbitrator; and (4) the decision is not repugnant to the purposes and policies of the Act.[9] There is no contention here that either the 1988 meetings between the Union and the Respondent that produced the ''Last Chance Agreements'' or the grievance procedure that culminated in the 1990 arbitration decision were not fair and regular or that all participating parties had not agreed to be bound by the results.

The arbitrator considered the unfair labor practice at issue. He specifically stated in his decision that the restriction on holding union positions imposed by the ''Last Chance Agreements'' applied legitimately only to those positions having direct contact with management pursuant to both the National Labor Relations Act and the collective-bargaining agreement.[10] Accord-

[7] *Barton Brands*, 298 NLRB 976, 980 (1990), and cases cited.

[8] [T]he deferral principles apply equally to settlements arising from the parties' contractual grievance/arbitration procedures because they further the national labor policy which favors private resolutions of labor disputes.'' *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985), petition for review denied sub nom. *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987); *Postal Service*, 300 NLRB 196 (1990); *Catalytic, Inc.*, 301 NLRB 380 (1991), petition for review denied sub nom. *Plumbers Local 520 v. NLRB*, 955 F.2d 744 (D.C. Cir. 1991).

[9] *Olin Corp.*, 268 NLRB 573 (1984).

[10] The arbitrator explained:

> While the grievant's actions in the course of the wildcat strike in July 1988 may have been appropriate grounds for removing him from his Safety Committee position and precluding him from seeking or holding any other Union office in which he would be dealing directly with mine Management as a representative of the bargaining unit, to go beyond that and preclude him from seeking or holding a Union office in which he does not deal at all with Management as a representative of the classified Employees, seems to be an unwarranted interference in the internal affairs of the Union and discrimination on the basis of intra-Union activity. The members of the Union have the statutory right to be represented by someone of their own choosing, and that right would be diluted here for no good and valid reason. The Employer's concern was with having to deal with the grievant as a representative of the Employees, not what he was doing away from the operations.

ing to the arbitrator, the grievant had to be free to hold all other union positions dealing with internal union affairs. Although the arbitrator's analysis did not include a lengthy discussion of the unfair labor practice issue, we are satisfied that this issue was not ignored. Indeed, the arbitrator's conclusion accords with our own analysis as set forth below. Like the arbitrator, we also find no impediment under the National Labor Relations Act if, as here, the restriction imposed by the ''Last Chance Agreements'' applies only to those union positions that deal directly with management and continues only for the duration of the current contract.

As to the fourth standard, we find that the ''Last Chance Agreements,'' arrived at through negotiations involving the employees and their Union, as interpreted by the 1990 arbitration award are not repugnant to the purposes and policies of the Act on the facts of this case.

Thus, it is undisputed that Mark Segedi, Fred Eimer, Patsy Bava, Joseph Goblesky, and Jared Dobrinski engaged in an unprotected, unauthorized work stoppage at the Employer's facility and extended this misconduct by picketing an unrelated employer. Three of the five employees held union office; Bava was president. By engaging in an unauthorized work stoppage in contravention of the contract's mandatory procedures for the peaceful resolution of disputes over health care benefits, the five employees exhibited contempt for the collective-bargaining agreement. Their conduct was thus inimical to the welfare of the unit and the Union's representative function. In these circumstances, it was not arbitrary for the Respondent to seek to prohibit employees who had blatantly ignored the contract from holding union positions that required the occupants directly to deal with management for the duration of that contract. See *NLRB v. Kentucky Utilities Co.*, 182 F.2d 810, 811 (6th Cir. 1950), cited with approval in *NLRB v. Roscoe Skipper, Inc.*, 213 F.2d 793 (5th Cir. 1954).

The prohibition was a condition narrowly drawn to fit the situation and designed to be prophylactic. The Union had requested that the Respondent reduce the discharges to a lesser penalty. The compromise agreement, as interpreted by the arbitrator, forbade the employees from holding union positions which entailed dealings with the Respondent.[11] The ban on holding such offices was limited to the term of the contract. In our view, there was a nexus between the employees' unprotected conduct and Respondent's legitimate interests as reflected in the agreement. The agreement was designed to ensure that those who had shown contempt for the collective-bargaining agreement would not hold collective-bargaining positions (vis-a-vis Respondent) for the remainder of the collective-bargaining agreement. Thus, there would be a diminished likelihood that persons in union positions of responsibility (vis-a-vis Respondent) would use their influence for purposes inimical to the collective-bargaining relationship.[12]

We also find that the five employees waived their Section 7 rights. No doubt, a waiver of a statutory right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). In this case, however, the evidence shows that the Union discussed with Segedi, Eimer, Bava, Goblesky, and Dobrinski the Respondent's proposed limitation on the exercise of their Section 7 rights. The five affected employees stated that they were willing to sign a document incorporating this condition and they did so. With full awareness of what they were doing, they signed the ''Last Chance Agreements,'' which stated: ''I agree that I will not hold or seek to hold any union office or act as a representative for the term of the NBCWA of 1988, as defined by the UMWA International Constitution, or any subsequent UMWA Constitution.'' In these circumstances, Segedi, Eimer,

[11] The arbitrator rejected Respondent's interpretation which would have included union positions which involved only internal union responsibilities. The arbitrator's interpretation of the agreement is, in law, the agreement of the parties. See *Mine Workers Local 9735 (Westmoreland Coal)*, 117 NLRB 1072 (1957).

[12] This nexus between employee misconduct and the restriction imposed on the Sec. 7 right distinguishes this case from those cited by the General Counsel. In *Dravo Corp.*, 228 NLRB 872 (1977), the Board found that the employer violated Sec. 8(a)(3) and (1) of the Act by conditioning an employee's recall on his refraining from acting as steward on behalf of the union. The Board particularly noted that, although the employee as steward had interfered with other contractors, these events occurred well before the end of the employee's last tenure as steward and the employer had merely issued some perfunctory verbal warnings and ignored the contractual provisions that were applicable to the employee's conduct. *Dravo Corp.*, supra at 874. In *Sycon Corp.*, 258 NLRB 1159 (1981), the Board likewise found that an employer violated Sec. 8(a)(3) and (1) of the Act by conditioning an employee's reinstatement on his signing an agreement that he not serve as chairman or committeeman of the union for the duration of the next two collective-bargaining contracts. The administrative law judge's decision, adopted by the Board, particularly noted that there was ''no evidence in the record that [the employee] in any way abused his privileges of acting as committee chairman or committeeman in presenting grievances or other matters on behalf of his fellow employees.'' *Sycon Corp.*, supra at 1160. Similarly in *Vulcan-Hart Corp.*, 262 NLRB 167, 168 (1982), the Board found a violation where an employer proposed to a lawful economic striker that he would be permitted to return to work if he resigned from union office and agreed not to run for union office during the term of the 3-year contract. Such a proposal clearly violates the Act. It falls within the parameters of the long-established prohibition on employers refusing to hire employees solely because of their affiliation with a labor union. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). None of these cases involve employee union officials whose conduct showed contempt for the collective-bargaining agreement and whose employer contemporaneously mitigated lawful discipline by reinstating them with a limit on their exercise of Sec. 7 rights narrowly tailored to the situation. That is the case here.

Bava, Goblesky, and Dobrinski clearly and unmistakably waived the Section 7 right at issue.[13]

The waiver by the affected employees themselves[14] distinguishes this case from *Barton Brands*, supra, and *Aces Mechanical Corp*.[15] relied on by the General Counsel. In *Barton Brands* an arbitrator found an employee's discharge valid but held that mitigating circumstances warranted a lesser penalty than discharge. The arbitrator reinstated the employee but required that he resign from his position as plant chairman and refrain from holding those union offices dealing directly with the company for 3 years. The arbitrator also imposed immediate discharge for violation of this condition. The employer reinstated the employee to layoff status following the arbitrator's decision. While on layoff, the employee was elected president of the union. The employer discharged him pursuant to the arbitrator's award.

In finding that the discharge violated Section 8(a)(3) and (1) of the Act, the Board noted, inter alia, that the arbitrator, in formulating his conditional reinstatement remedy, did *not* consider whether *the employee* had waived his Section 7 right to hold union office.[16] The Board also rejected the argument that the union's agreement to arbitrate the discharge gave the arbitrator the authority to formulate the conditional reinstatement remedy. The Board stated that ''an agreement to arbitrate a specific discharge, without more, does not meet the exacting standards we require of a waiver of an employee's statutory rights.''[17] By contrast, in this case, Segedi, Eimer, Bava, Goblesky, and Dobrinski discussed the limitation on the exercise of their right to hold union office with their union representatives and affirmed the limitation in writing.[18]

In *Aces Mechanical Corp.*, the union president suggested to the employer's president that the steward who had been discharged for tardiness be permitted to return to work as a journeyman plumber and not as shop steward. The employer's president declined and said he intended to pursue the arbitration over the discharge. When the steward returned to work, the foreman told him that he was only a journeyman plumber not a steward. The steward disputed this and contacted the union. The secretary-treasurer of the union reported to the jobsite and told the foreman that the employee was the steward. The applicable collective-bargaining agreement gave the union's secretary-treasurer the authority to appoint the steward. When the employer's president advised the union's secretary-treasurer that he had made an agreement with the union's president that the employee could no longer be steward, the union's secretary-treasurer insisted that the employee was still the steward.

In finding that the employer violated Section 8(a)(3) and (1) of the Act by insisting that the employee could not continue to work as steward, the Board specifically noted that even assuming without deciding that the union could waive the employee's protected right to act as union steward, there was no clear and unmistakable waiver. Thus, both the employee and the union agent empowered to appoint the steward adamantly maintained that the employee was the steward. Again, the situation is unlike that of Segedi, Eimer, Bava, Goblesky, and Dobrinski. They discussed the limitation on the exercise of their right to hold union office with their union representatives and agreed to the limitation in writing.

Accordingly, we find the General Counsel's reliance on *Barton Brands* and *Aces Mechanical Corp.* to be misplaced.

Under all these circumstances we find that the arbitration award is not palpably wrong. Accordingly, we defer to the award and shall dismiss the complaint.

[13] We find no merit to the General Counsel's argument that there can be no waiver because the five employees acted under duress. The General Counsel contends that the alternatives presented to the employees—relinquish the right to hold union office or possibly relinquish employment through pursuing the discharge grievances—amounted to a ''Hobson's choice.'' We disagree. We note specifically the uncontroverted evidence that: (1) the Union first approached the Respondent and asked the Respondent to reduce the discharges to a lesser penalty; (2) the Union and the Respondent engaged in settlement discussions; (3) the Union discussed the Respondent's proposed conditional reinstatement with the employees; and, (4) the five employees then consented to the conditions. Segedi, Eimer, Bava, Goblesky, and Dobrinski thereby willingly relinquished the option of pursuing their discharges through the grievance-arbitration procedure and participated in each step of the settlement discussions and their consummation with the ''Last Chance Agreements.'' We find that their conduct reflected informed consent, not duress.

[14] We need not reach the issue of whether a union may waive employees' rights to hold union office. See *Barton Brands*, supra at 980; *NLRB v. Aces Mechanical Corp.*, 837 F.2d 570, 573 fn. 3 (2d Cir. 1988).

[15] 282 NLRB 928 (1987), enf. denied 837 F.2d 570 (2d Cir. 1988).

[16] *Barton Brands*, supra at 979.

[17] Ibid.

[18] We note that in *Sycon Corp.*, the employee involved similarly signed an agreement with a comparable limitation. As we have already noted, however, in that case there was no nexus between the employee conduct and the limitation imposed by the employer. Thus the issue of waiver was irrelevant in the face of the employer's unwarranted limitation of the employee's exercise of his Sec. 7 right to hold union office.

CONCLUSION OF LAW

By conditioning the reinstatement of Mark Segedi, Fred Eimer, Patsy Bava, Joseph Goblesky, and Jared Dobrinski on their written agreement not to hold office or seek to hold any union office or to act as representative of the Union before February 1, 1993, in the circumstances of this case, the Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

ORDER

The complaint is dismissed.